No. 293

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Supreme Court of the United States

OCTOBER TERM—1944

Meseck Towing & Transportation Company,

Petitioner,

against

EDWARD E. RICE, on behalf of himself and of his co-partners, doing business under the firm name and style of JACOB RICE & SONS, as owners of the scow "GEORGE R.",

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CHRISTOPHER E. HECKMAN,
Counsel for Petitioner.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Meseck Towing & Transportation Company, prays that a writ of certiorari issue to review the decision and decree of the Circuit Court of Appeals in the above case, involving damage to libellant's scow "George R." while being towed in ice for which petitioner's tug "Marion A. C. Meseck" was held liable by the opinion of the Circuit Court of Appeals (Record pp. 64-67), reported at 148 F. (2nd) 522 which reversed the decision of the District Court (Record pp. 51-53) reported at 53 Fed. Supp. 618.

Statement of Facts

Petitioner's tug, "Marion A. C. Meseck", was working as a "shifting tug" for the steamship company operating Pier 97, North River, New York, where, manned by em-

ployees of the petitioner, she moved vessels from and to points along and near Pier 97 as and when directed by the steamship company's so-called harbor master, or boss stevedore. The steamship company paid petitioner on an hourly basis for the tug's services regardless of the amount of shifting the tug may have done in any hour.

On the morning of January 20, 1943, libellant's scow, "George R.", with cargo consigned to that pier, was lying at Pier 97 where it had been sent by its charterer. To complete the discharge of the scow's cargo, the steamship company harbor master directed the "Marion A. C. Meseck" to move the "George R." from her then position to a point along the side of Pier 97, abreast of a certain door in the shed on the pier. That berth was occupied by another vessel which the "Meseck" first moved before she maneuvered the "George R." into the designated berth. In the course of this maneuver, her master, who was in the tug's pilot house, was advised by the steamship company's harbor master who was aboard the "George R." that there was some ice between the "George R." and the pier, but that as the "Meseck" pushed the stern of the "George R." to the pier, this ice would float under the spiles of the dock (8th Finding of Fact, R. p. 55). The "Meseck" pushed against the stern of the "George R." slowly and carefully until it was against the pier and the scow was then tied up. Later she was found to have sustained damage attributed to the ice.

The District Court found that the "Meseck" pushed the "George R." into the pier carefully and properly (110th Finding of Fact, R. p. 55); that there were no contractual relations between the libellant and the "Meseck"; that the orders to move the "George R." to the designated point along the pier were given by the harbor master; that the orders to push the scow into the pier when she arrived at the designated point were given by the harbor master and the head stevedore, in the employ of the parties who were paying for the services of the "Meseck" (Finding 13th,

R. p. 168); and concluded that as the "Marion A. C. Meseck" was liable only for negligence and as her engagement was to carry out the orders and directions of the harbor master and the stevedore in charge of the pier, which she did properly, she should not be held liable. The District Court also found that any risk in maneuvering the "George R." into the pier was assumed by those who directed the "Meseck" to do so.

The Circuit Court of Appeals reversed without disturbing the District Court's findings of fact.

The Question Presented

The question here involved which is of great importance to the entire marine industry is: May the master of a tug doing work for the consignee of a scow assume that the consignee has authority to bind the scow's owner when the former orders the scow moved during dangerous ice conditions?

Reasons Relied Upon for the Allowance of the Writ

1. The question involved is of paramount importance to the marine industry. In New York Harbor alone, with its myriads of piers, scows and barges without motive power are moved hourly along steamship piers by "shifting tug" at the direction of the steamship companies' harbor masters in charge of the piers.

2. It is well settled that the towed vessel assumes the risk of towage in ice when the orders to tow are given by her owner or charterer with knowledge of the ice conditions. It is important for the maritime industry to know whether a shifting tug may accept orders from the consignee of a scow under the assumption that the consignee has implied authority to act for the owner in assuming the risk of damage by ice.

Therefore the question should be finally and definitely determined by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the 2nd Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket 267, October Term 1944, Edward E. Rice, on behalf of himself and of his co-partners doing business under the firm name and style of Jacob Rice & Sons, as owners of the scow "George R.", Libellant-Appellant, against Tug "Marion A. C. Meseck", Meseck Towing & Transportation Company, Claimant-Appellee; and that said decree of the Circuit Court of Appeals may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as may seem just.

MESECK TOWING & TRANSPORTATION COMPANY,

By CHRISTOPHER E. HECKMAN,
Counsel.

Supreme Court of the United States

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions Below

The opinion of the District Court, officially reported in 53 Fed. Supp. 618 and the Findings of Fact and Conclusions of Law are printed in the Record (pp. 51-57).

The opinion of the Circuit Court of Appeals, officially reported in 148 Fed. (2nd) 522 appears in the Record (pp. 64-67).

II

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13th, 1925, United States Code, Title 28, Section 347. The

decree (order for mandate) sought to be reviewed was entered on May 3rd, 1945. The petition for rehearing was denied April 27, 1945.

III

Statement of the Case

A summary statement of the case is contained in the petition and is here omitted in the interest of brevity.

IV

Specifications of Errors

The Circuit Court of Appeals erred in the following respects:

1. In failing to conclude that it was the "Marion Meseck's" contractual obligation to tow vessels when directed by the Steamship Company's employee, the harbor master, and that as the "Meseck" towed the "George R." at the time and to the place directed by the harbor master any risk of damage from towing at such time and between such places was assumed by the Steamship Company.

2. In failing to conclude that libellant could not recover from the "Meseck" because he was bound by the acts of the harbor master in the employ of the Steamship Company, the consignee of the scow who assumed the risk of towage in ice.

ARGUMENT

POINT I

The Circuit Court of Appeals erred in failing to hold that libellant was bound by the act of the scow's consignee, whose employee, the harbor master, assumed the risk of damage from ice.

When an owner or a charterer orders a boat towed through ice the owner assumes the risk of damage to the tow from such ice. *Monk* v. *Cornell Steamboat Company*, 198 Fed. 472; *Clark* v. *The Bear*, 11 F. (2nd) 607; affirmed 11 F. (2nd) 608.

In this case the Circuit Court of Appeals inferred that the libellant had a cause of action against the steamship company because of the orders given by the harbor master, saying in its opinion (R. p. 66):

> "It may be that the steamship company and its employees, had they been sued by the libellant, would have been held liable; but that fact could not free the tug from liability. 'That a principal is liable for a wrong does not necessarily immunize his agent • • • The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow.' "

Thus it appears that the Circuit Court of Appeals recognized the steamship company as the principal in the transaction. The duties, obligations and liabilities of a tug flow from the contract between the principal and the tug or her owner and libellant must take the position that the contract or arrangement for the shifting of the "George R." was made by the steamship company for and on behalf of libellant; otherwise the "Meseck" had no obligation whatsoever to the libellant.

In that situation the Circuit Court of Appeals should have held that because the Steamship Company assumed the risk of ordering the towage at the time and under the circumstances then existing, libellant by suing the tug *in rem* cannot thereby place the risk of damage on the tug.

When libellant adopts the Steamship Company's contract with the tug, which he does by instituting suit, he must take it subject to all implied terms thereof, including the assumption of risk of damage by ice. If that be not the law, then it would follow that shifting tugs at piers may no longer carry out the orders and directions of the employee of the Steamship Company which has hired the services of the tug because the owner of the vessel to be towed is not bound by the acts of such employees. The result would be that before moving a boat the tug master would have to communicate directly with the owner of the scow or barge to be moved and secure his approval. Obviously the business of loading ocean going vessels from barges or scows would be greatly delayed by the necessity for direct communication with the owner of the vessel to be towed each time a movement from one place to another at the pier is desired.

CONCLUSION

The petition should be granted.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Counsel for Petitioner.